

STUDENT ACCESS

Section 504 of the Rehabilitation Act of 1973

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Missouri Department of Elementary and Secondary Education
Robert E. Bartman, Commissioner of Education

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Preface

It is the policy of the Missouri State Board of Education and a priority of the Missouri Department of Elementary and Secondary Education that there will be no discrimination or harassment on the grounds of race, color, sex, marital status, religion, national origin, age or disability in any educational programs, activities, or employment

A complimentary copy of this document has been sent to each Missouri school district. The Missouri Department of Elementary and Secondary Education does not administer Section 504 of the Rehabilitation Act of 1973, nor does it monitor compliance with Section 504*. Any questions relating to the compliance requirements of Section 504 should be addressed to the Office for Civil Rights, United States Department of Education. The Office for Civil Rights Regional Office is located in Kansas City and can be reached at (816) 268-0550 or RELAY MISSOURI at (800) 735-2966 (telecommunication device for the deaf).

With minor revisions, this document incorporates in its entirety the Oregon Department of Education's document "Student Access: Section 504 of the Rehabilitation Act of 1973." The Missouri Department of Elementary and Secondary Education wants to thank the Council of Administrators of Special Education, Inc. (CASE) for use of the diagrams which appear in Appendix B of this document.

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The use of the terms "handicap" and "handicapped" reflects current statutory and regulatory language under Section 504. Where possible, "people first" terms such as "children with disabilities" are used, and reflect current statutory and regulatory language under the Individuals with Disabilities Act.

* There is some limited monitoring conducted by the Missouri Department of Elementary and Secondary Education's Vocational and Adult Education Division, of school districts and community colleges which offer vocational programs.

Introduction

Section 504 of the Rehabilitation Act of 1973 is a civil rights statute which provides that: "No otherwise qualified individual with disabilities in the United States...shall, solely by reason of his/her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." (20 USC Section 794) This short paragraph has far reaching implications for school districts which this paper hopes to address.

Definitions

What is a "program or activity"?

The term includes all programs or activities of the Missouri Department of Elementary and Secondary Education (DESE) and all school districts receiving federal funds regardless of whether the specific program or activity involved is a direct recipient of federal funds. (e.g., If a district contracts with a private agency, the district must insure that a student with disabilities has an equal opportunity to participate in private agency's education program, even though the programs themselves do not receive any federal funds.) 34 CFR Section 104.3(f); Civil Rights Restoration Act of 1988 (PL 100-259)

Who is a "qualified" individual with disabilities?

For school districts, all school-age children are qualified. 34 CFR Section 104.3(k) Parents who have a disability are also protected by Section 504. For example, a district should provide an interpreter or some other equivalent service to a parent who is deaf in order to insure that s/he has an equal opportunity to participate in school initiated activities. For information on the meaning of "qualified" as it pertains to employees, see the Employment Practices Section of this paper.

Who is an "individual with a disability"?

There are three ways that a person may qualify as an individual with disabilities under the regulations. A person is considered disabled under Section 504 if s/he:

1. Has a physical or mental impairment which substantially limits one or more major life activities such as walking, learning, hearing, caring for one's self, performing manual tasks, speaking and breathing (e.g., any student receiving services under the Individuals with Disabilities Education Act (IDEA); drug addicted or alcoholic students; students with diabetes). The term does not cover children disadvantaged by cultural environmental or economic factors. And, the term does not include individuals currently engaging in the illegal use of drugs. Comment to 34 CFR Section 104.3
2. Has a record or history of such an impairment (e.g., a student with learning disabilities who has been decertified as eligible to receive special education under the IDEA; a student who had cancer; a student in recovery). The term includes children who have been misclassified (e.g., a non-English speaking student who was mistakenly classified as having mental retardation).
3. Is regarded as having such an impairment. A person can be found eligible under this section if s/he:

- a. has a physical or mental impairment that does not substantially limit a major life activity but is treated by the district as having such a limitation (e.g., a student who has scarring, a student who walks with a limp);
 - b. has a physical or mental impairment that substantially limits a major life activity only as result of the attitudes of others towards such impairment (e.g., a student who is obese); or
 - c. has no physical or mental impairment but is treated by the district as having such an impairment (e.g., a student who tests positive with the HIV virus but has no physical effects from it).
- 34 CFR Section 104.3(j)

What is a "major life activity"?

Major life activities include walking, seeing, hearing, speaking, breathing, learning, working, caring for oneself and performing manual tasks. The disability need only substantially limit one major life activity in order for the student to be eligible. 34 CFR Section 104.3(j)

What is the difference between Section 504 and the IDEA as to who is protected?

The IDEA specifically lists types of disabilities which render a child entitled to receive special education. Additionally, in order to be entitled to receive services under the IDEA, the disabling condition must result in a need for special education.

Section 504 is much broader than the IDEA; there is no categorical listing of disabling conditions. However, if a child is IDEA eligible, s/he will also be protected under Section 504. The regulations also make clear that certain conditions, such as drug or alcohol addiction, heart disease, etc., which would not qualify a child under the IDEA, may be disabilities under Section 504. While Section 504 requires that the disability "substantially limit a major life activity" such as walking, it need not necessarily adversely affect the student's educational performance.

Examples of other potential disabilities under Section 504 if they substantially limit a major life activity, not typically covered under the IDEA:

1. Communicable diseases: AIDS, AIDS related complex (ARC) or asymptomatic carriers of the AIDS virus (HIV); tuberculosis
2. Temporary disabilities: Students injured in accidents or suffering short-term illnesses
3. Attention Deficit Disorder (ADD)
4. Chronic asthma and severe allergies
5. Physical disabilities such as spina bifida, hemophilia and conditions requiring children to use crutches
6. Diabetes

Note that some of these conditions, such as tuberculosis, diabetes and hemophilia may be severe enough to affect educational performance and therefore fall under the IDEA as well.

Note - See Appendix B for diagrams illustrating the relationship between Section 504 and IDEA

How is discrimination defined?

Discrimination under Section 504 occurs when a recipient of federal funds:

1. Denies a person with a disability the opportunity to participate in or benefit from an aid, benefit or service which is afforded students with disabilities (e.g., district practice of refusing to allow any

student on an IEP the opportunity to be on the honor roll; denial of credit to a student whose absenteeism is related to his/her disability; expelling a student for behavior related to his/her disability; refusing to dispense medication to a student who could not attend school otherwise).

2. Fails to afford the person with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is equal to that afforded others (e.g., applying an MSHAA policy that conditions interscholastic sports eligibility on the student's receiving passing grades in five subjects without regard to the student's disability).
3. Fails to provide aids, benefits, or services to the person with a disability that are as effective as those provided to nondisabled persons (e.g., placing a student with a hearing impairment in the front row as opposed to providing her with an interpreter). Note: "Equally effective" means equivalent as opposed to identical. Moreover, to be equally effective, an aid, benefit or service need not produce equal results; it must merely afford an equal opportunity to achieve equal results. Comment to 34 CFR 104.4(b)(2)
4. Provides different or separate aids, benefits or services unless such action is necessary to be as effective as the aids, benefits or services provided to nondisabled students (e.g., segregating students in separate classes, schools or facilities, unless necessary).
5. Aids or perpetuates discrimination by providing significant assistance to an agency, organization or person that discriminates on the basis of disability (e.g., sponsoring a student organization that excludes persons with disabilities).
6. Denies a person with disabilities the opportunity to participate as a member of a planning or advisory board strictly because of his/her disabilities
7. Otherwise limits the enjoyment of any right, privilege, advantage or opportunity enjoyed by others (e.g., prohibiting a person with a physical disability from using a service dog at school).
8. In determining the site or location of a facility, makes selections which effectively excludes persons with disabilities, denies them the benefit of, or otherwise subjects them to discrimination. In *Hendricks v. Gilhool*, EHLR 441:352 (1989), the Pennsylvania Department of Education was found to have violated this section and the EHA by allowing students with disabilities to be located in inferior facilities, such as trailers, wings in basements and unnecessarily restrictive classrooms due to a lack of classroom space. 34 CFR Section 104.4

Procedural Requirements of Section 504

To be in compliance with Section 504, school districts must do the following:

1. Provide written assurance of nondiscrimination whenever the district receives federal money (e.g., on the LEA application). 34 CFR Section 104.5(a)
2. Designate an employee to coordinate compliance with Section 504 (if there are more than 15 employees). 34 CFR Section 104.7(a)
3. Provide grievance procedures to resolve complaints of discrimination (if more than 15 employees); this does not apply to denial of employment. 34 CFR Section 104.7(b) Note: students, parents or employees are entitled to file grievances. A grievance procedure like that afforded to parents under the Family Educational Rights and Privacy Act for resolving disputes about student records would suffice.
4. Provide notice to students, parents, employees, unions, and professional organizations of nondiscrimination in admission or access to, or treatment or employment in, its programs or activities (if more than 15 employees). Notice must also specify the responsible employees. Notice must be included in student/parent handbook. 34 CFR Section 104.8

5. Annually identify and locate all Section 504 qualified children with disabilities in the district's geographic area who are not receiving a public education. 34 CFR Section 104.32(a)
6. Annually notify persons with disabilities and their parents or guardians of the district's responsibilities under Section 504. 34 CFR Section 104.32(b)
7. Provide parents or guardians with procedural safeguards:
 - a. Notice of their rights (a sample notice can be found in the appendix);
 - b. An opportunity to review relevant records; and
 - c. An impartial hearing. It is important that parents or guardians be notified of their right to request a hearing regarding the identification, evaluation, or educational placement of persons with disabilities. If the district proposes to change the student's placement and the parent files a request for a hearing, the district is obligated to maintain the student's placement until administrative proceedings are completed. The parents' right to an impartial hearing includes the right to an opportunity for participation and representation by counsel, and the right to a review procedure.

School District Obligations for Elementary and Secondary Education

1. Free Appropriate Education

Districts must provide a free appropriate education (regular or special education and related aids and services) to Section 504 school-age children with disabilities in the district's jurisdiction. Instruction must be individually designed to meet the needs of the student as adequately as the needs of nondisabled students.

Although Section 504 does not require school districts to develop an IEP with annual goals and objectives, it is recommended that the district document that the multi-disciplinary team convened and specified the agreed-upon services.

The quality of educational services provided to students with disabilities must be equivalent to the services provided to nondisabled students. Teachers must be trained in the instruction of persons with the disability in question and appropriate materials and equipment must be available. Comment to 34 CFR Section 104.33(b) (A district which has a policy of providing one hour per day homebound instruction to all persons with disabilities is discriminatory because the policy fails to give consideration to the individual needs of the student.)

NOTE: The child does not have to need special education in order to be qualified under Section 504. 34 CFR Section 104.33(a)(b)

a. Transportation

If a district places a student in a program not operated by the district, the district must assure that adequate transportation to and from the program is provided at no greater cost than the parent would have paid to transport the child to the district. 34 CFR Section 104.33(c)(2) If a district provides transportation to all its students within a certain geographic area, it may not discriminate in its provision of transportation to students with disabilities. 34 CFR Section 104.4(b)(1)(i)

If a district proposes to terminate a qualified student's bus transportation for inappropriate bus behavior, the district must first determine the relationship between the student's

behavior and his/her disability and provide the parent with notice of his/her rights. Change of Placement Procedures under IDEA meet this requirement. Note that the length of the bus rides for students with disabilities should not be longer than that of nondisabled students.

a. Residential placement

Must be provided at no cost to the parent or guardian only if necessary to provide a free appropriate education. 34 CFR Section 104.33(c)(3)

b. Out-of-district placements

If the district affords a free appropriate education to a student but the parent chooses to place the child elsewhere, the district is not responsible to pay for the out-of-district placement. 34 CFR Section 104.33(c)(4) This provision is identical to language contained in the IDEA. For example, if the district's program is appropriate and the parent places the child in a private school, the district is not responsible for the student's tuition.

2. Evaluation

a. If a student needs or is believed to need special education or related services, the district must evaluate the student prior to initial placement in a regular or special education program and before any "significant change in placement." 34 CFR Section 104.35(a)

A full evaluation is not required when neither the district nor the parents believe that the child is in need of special education or related services. However, the district should have current medical information if the multidisciplinary team needs it in order to make accommodations to the student's program.

b. The district must establish policies and procedures for evaluation and placement which assure that tests and other evaluation materials:

- Have been validated and are administered by trained personnel
- Are tailored to assess educational need and are not merely based on IQ scores
- Reflect aptitude or achievement or whatever else the tests purport to measure and do not reflect the student's impaired sensory, manual or speaking skills (unless the test is designed to measure these particular deficits).

34 CFR Section 104.35(b)

NOTE: There is no right to an independent evaluation under Section 504.

3. Placement Procedures

Like the IDEA, in interpreting evaluation data and making placement decisions, the district must:

- a. Draw upon information from a variety of sources;
- b. Assure that all information is documented and considered;
- c. Ensure that the placement decision is made by a group of persons including those who are knowledgeable about the child, the meaning of the evaluation data and placement options; and
- d. Ensure that the student is educated with his/her disabled peers to the maximum extent appropriate.

34 CFR Section 104.35(c)

4. Reevaluations

Section 504 requires "periodic" reevaluations. Unlike the IDEA, there is no specified time frame. However, school districts will be in compliance if they reevaluate the student every three years. Additionally, Section 504 requires a reevaluation before any significant change in placement. 34 CFR Section 104.35(a) and 34 CFR Section 104.35(d)

Examples of significant changes in placement which require reevaluation:

- Expulsion
- A series of suspensions which cumulatively exceed 10 days in a school year, and which creates a pattern of exclusions which constitute a significant change in placement (consideration given to the total amount of time the child is excluded from school, the length of each suspension, and the proximity of each suspension to one another.)
- Individual suspensions which exceed ten consecutive school days
- Transferring a student to home instruction
- Graduation from high school
- Significantly changing the composition of the student's class (e.g., moving the student from regular education to the resource room)

5. Least Restrictive Environment

Like the IDEA, to the maximum extent appropriate, districts must educate students with disabilities with nondisabled students. In order to remove a child from the regular educational environment, the district must demonstrate that education of the student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR Section 104.34

6. Nonacademic Services

Districts must provide equal opportunity in areas such as counseling, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs, referrals to other agencies and employment. 34 CFR Section 104.37

- a. Counseling: Districts may not counsel students with disabilities toward more restrictive career objectives. 34 CFR Section 104.37(b)
- b. Physical education and athletics: A district must provide an equal opportunity for students with disabilities to participate. A district may offer these activities separately for students with disabilities only if necessary and the district may not deny a student with a disability the opportunity to compete in activities which are not separate. 34 CFR Section 104.37(c)

May the district use IDEA money to serve children determined eligible under Section 504 but not IDEA?

No. However, the district may use IDEA B monies to evaluate the child if the school district believes that the child may also be eligible for special education. Moreover, if a student's addiction results in an IDEA disability (for example, the child becomes seriously emotionally disturbed) IDEA monies may then be used to serve the child. 211 EHLR DEC.431 (OSEP 1986)

Special Issues Regarding Students Addicted to Drugs or Alcohol

If the district suspects that a student has an alcohol or drug problem, what should it do?

If a district suspects that the drug or alcohol problem may be substantially limiting a major life activity, such as learning, the district is obligated to seek an evaluation at district expense. However, individuals who are currently engaged in the use of illegal drugs or alcohol would not be entitled to such an evaluation. Although Section 504 does not require consent before evaluations, it is a good practice to secure written consent. If the evaluation verifies the existence of a disability which substantially limits a major life activity, the student is considered disabled under Section 504.

The district must then convene a group of people knowledgeable about the child, capable of interpreting the data, and familiar with placement options. The team must then design an educational program to meet the student's individual needs and give notice to the student's parent or guardian of their rights under Section 504. The district must periodically reevaluate the student and may not make a significant change in the student's placement without providing the parent or guardian with notice and conducting a reevaluation.

What if such a student is caught with drugs at school?

A school district is entitled to enforce its rules prohibiting the use, sale or possession of drugs or alcohol by drug- or alcohol-addicted students, provided that the rules are enforced evenly with respect to all students.

Comment to 34 CFR Section 104.3(j)

School districts are not required, under Section 504, to provide due process in disciplinary actions involving prohibited drug and/or alcohol possession.

Thus, if the student is only protected by Section 504 (and is not IDEA eligible) the district does not have to afford the student his/her federal due process rights. 29 USC 706(8)(C)(iv) This is a notable exception to the general prohibition under Section 504 and the IDEA to expelling a student for behavior related to his/her disability. However, if the student is also eligible under the IDEA (e.g., the student has a learning disability and is drug addicted), the district must, under Section 504, evaluate the relationship between the behavior and the disability and afford the student his/her due process rights. Under the IDEA, the student would be afforded his/her due process rights.

Special Considerations for Students Having AIDS or HIV Infection

Students with Acquired Immune Deficiency Syndrome (AIDS), Aids-Related Complex (ARC) or otherwise infected with Human Immunodeficiency virus (HIV-infected) are individuals with disabilities under Section 504. They either qualify as actually having a physical impairment which substantially limits a major life activity or are regarded as having such a disability. Depending on the nature of the disease and the student's other conditions, the student may also qualify under the IDEA.

Placement of the student must be made by a group of persons knowledgeable about the child, the meaning of the evaluation and medical information, and placement options. A public health representative should be on the team. Unless currently presenting a risk of contagion due to the stage of the disease (e.g., a contagious opportunistic infection, open lesions that cannot be covered) or parents and schools agree on an alternative, a child with AIDS should remain in the regular classroom.

Program Accessibility

What is a district's responsibility to make buildings accessible?

Under Section 504, facilities which were constructed prior to June 3, 1977 need not necessarily be made accessible so long as the program or activity, viewed in its entirety, is readily accessible to persons with disabilities. 34 CFR Section 104.22 It would not be necessary to make every high school in a district accessible. However, the student must be afforded an equal opportunity to enjoy the full range of services offered by the district. For example, if a district runs a magnet school with specialized studies, students may not be denied access to the program merely because of accessibility problems. It would not be discriminatory, however, if a district contracts with a private agency that cannot accept students needing special education because of the lack of a qualified teacher so long as the district is able to afford special education students a comparable program elsewhere.

Short of major modifications, what can a district do?

A district can redesign equipment, reassign classes or other services to accessible buildings, assign aides to students, deliver services at alternate accessible sites, or alter existing facilities. So long as there are other methods which are as effective in achieving compliance, a district need not undertake structural changes to a building. 34 CFR Section 104.22(b)

What are some examples of what is not an acceptable accommodation?

Carrying a student upstairs; in a larger district, making one particular building or part of a building accessible and placing all students with mobility impairments at this location (Comment to 34 CFR Section 104.22); having students with disabilities eat on a separate floor due to an inaccessible cafeteria if such an arrangement isolates students with disabilities from nondisabled students, provides the students with disabilities with food that is inferior in quality or condition than that provided to nondisabled students and/or is located in space which is inferior to the inaccessible cafeteria (If the district provides an alternative eating area that meets OCR standards in an existing facility constructed before the effective date of the Section 504 regulation on June 3, 1977, it would be sufficient for compliance with the program accessibility requirement of Section 504.); denying certain programs such as music, art or assembly because these programs are inaccessible.

What is the district's obligation for new buildings or additions?

Under Section 504 buildings or additions constructed since June 3, 1977 must be designed and constructed to allow persons with disabilities the ability to access and use them readily.

34 CFR Section 104.23(a)

For example, multilevel buildings should have ramps or elevators, accessible bathrooms, doorways constructed wide enough to fit wheelchairs, etc. Contractors should be familiar with accessibility requirements.

What is a district's obligation when a building is altered?

Under Section 504, to the maximum extent feasible, all facilities which are altered after June 3, 1977 must be altered to allow accessibility and usability by persons with disabilities.

34 CFR Section 104.23

(b) For example, if a school district adds on a wing to a building, the wing must be made accessible. Or, if a storage room is modified into a classroom, modifications, such as widening the doorway, must be made.

Note: Under the recent Americans With Disabilities Act (ADA) the physical accessibility requirements are more stringent. Therefore, school district administrators need to become familiar with the newer requirements under the ADA. For more information on these you can telephone the enforcement agency

charged with ADA compliance: U.S. Department of Education, Office for Civil Rights Regional Office (816) 891-8103 or RELAY MISSOURI 816/374-6461 (telecommunication device for the deaf).

What is meant by the phrase "to the maximum extent feasible"?

This provision covers the occasional instance where the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate in a manner that results in its being entirely barrier-free. However, in all of these instances, the alteration should provide the maximum amount of physical accessibility that is feasible. Comment to 34 CFR Section 104.23(b)

Who should a district call regarding technical assistance on accessibility issues?

The U.S. Department of Education's Office for Civil Rights (OCR) can provide technical assistance to districts on how to fulfill the requirements of Section 504. The regional office which serves Missouri is located in Kansas City and can be reached at (816) 891-8103 or RELAY MISSOURI 816/374-6461 (telecommunication device for the deaf).

Employment Practices

For purposes of employment, who is a qualified individual with disabilities?

A qualified individual with disabilities is one, who with reasonable accommodation, can perform the essential functions of the job in question. 34 CFR Section 104.3(k)(1)

What are a district's responsibilities for hiring persons with disabilities?

School districts, because they receive federal financial assistance under the IDEA, are required to take positive steps to employ and advance qualified individuals with disabilities. 34 CFR Section 104.11(a)(2) Districts must make reasonable accommodations to the known physical or mental limitations of an otherwise qualified applicant or employee who has a disability unless the accommodation would impose an undue hardship on the operation of the district's program. 34 CFR Section 104.12(a)

What is considered an "undue hardship"?

The regulation lists the following factors which should be considered:

1. The overall size of the district's program with respect to the number of employees, number and type of facilities, and size of budget;
 2. The type of the district's operation, including the composition and structure of its workforce; and
 3. The nature and cost of the accommodation needed.
- 34 CFR Section 104.12(c)

What are reasonable accommodations?

Some examples of reasonable accommodations are:

1. Making facilities readily accessible to and usable by persons with disabilities.
 2. Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters.
- 34 CFR Section 104.12(b)

When may a district refuse to hire an applicant or promote an employee who has a disability?

When the person is not qualified, where reasonable accommodation does not overcome the effects of the person's disability, or where reasonable accommodation causes undue hardship to the employer. Comment to 34 CFR Section 104.12

Is the district prohibited from asking applicants about any disabilities s/he may have?

Generally, an employer covered by Section 504 may not conduct a preemployment medical examination or make preemployment inquiries as to whether an applicant has a disability. However, the employer may inquire into an applicant's ability to perform job-related functions. For example, an employer may not ask an applicant if s/he has epilepsy but may ask whether s/he can perform a particular job without endangering other employees.

If the employer is attempting to rectify past discrimination or taking voluntary action to overcome limited participation in its workforce, the employer may invite, but may not require, applicants to indicate to what extent they are disabled. In such instances, the employer must be clear that such information is voluntary and is intended solely to meet the employer's affirmative action or other obligation. 34 CFR Section 104.14

Are medical examinations totally prohibited?

An employer may condition employment on the results of a medical examination only if all applicants, regardless of disability, are also subject to such an examination and if the results are kept confidential. 34 CFR Section 104.14

What limitations are there on an employer regarding testing applicants?

A test which tends to screen out persons with disabilities may not be used unless the test score is shown to be job related and alternative job related tests which do not screen out persons with disabilities are not available. Tests must also be administered in a manner that reflect actual aptitude or skill rather than the sensory, manual or speaking impairment of the applicant unless the test purports to test these skills. 34 CFR Section 104.13

Is an employer allowed to provide differences in fringe benefits or contributions for persons with disabilities if justified on an actuarial basis?

No. Such a suggestion was rejected by the U.S. Department of Education when the regulations were adopted. 34 CFR Section 104.11 and Comment

What is an employer's obligation to hire or retain a persons who is addicted to alcohol or drugs?

An employer subject to Section 504 may not refuse employment to someone who has been addicted to drugs or alcohol in the past. If an applicant or employee is presently addicted to alcohol, the employer may not refuse or terminate employment unless the employer can show that the alcohol addiction prevents successful performance on the job or presents a direct threat to property or the safety of others. The employer may hold the addicted person to the same standards of performance and behavior as expected of others. The behavioral manifestations of the condition may be taken into account in determining whether s/he is qualified. An employer is not required to retain or hire an individual addicted to drugs who is currently using drugs. 29 USC 706(8)(C)(v); Comment to 34 CFR 104.3(j)

Is an employer entitled to administer drug testing to persons known to have been addicted in the past?

Recent amendments to Section 504 clarify that an employer is not prohibited from requiring an employee to be drug tested who has successfully completed or is presently participating in a supervised drug rehabilitation program. 29 USC 706(8)(C)(ii)

NOTE: Employment issues are very technical and districts are encouraged to contact their attorneys for more guidance in this area. This is especially necessary due to the recent Americans with Disabilities Act (ADA).

Major Differences Between The IDEA and Section 504

The IDEA P.L.94-142

Section 504

Who is Protected

Lists 13 categories of qualifying conditions.

Much broader. A student is eligible if s/he meets the definition of qualified person with a disability; i.e., has or has had a physical or mental impairment which substantially limits a major life activity, or is regarded as disabled by others.

Duty to Provide a Free Appropriate Education

Both require the provision of a free appropriate education to students covered under them including individually designed instruction.

Requires the district to provide IEPs. "Appropriate education" means a program designed to provide "educational benefit."

"Appropriate" means an education comparable to the education provided to nondisabled students.

Special Education vs. Regular Education

A student is only eligible to receive IDEA services if the multidisciplinary team determines that the student has one of the 13 disabilities and needs special education

A student is eligible so long as s/he meets the definition of qualified disabled person; i.e. has or has had. a physical or mental impairment which substantially limits a major life activity, or is regarded as disabled by others. The student is not required to need special education in order to be protected.

Funding

If a student is eligible under the IDEA, the district receives additional funding.

Additional funds are not provided.

Accessibility

Not specifically mentioned although if modifications must be made to provide a free appropriate education to a student, the IDEA requires it.

Detailed regulations regarding building and program accessibility.

Procedural Safeguards

Both require notice to the parent or guardian with respect to identification, evaluation, placement and the provision of a free and appropriate public education.

Requires written notice.

Does not require written notice but a district would be wise to do so.

Notice provisions are much more comprehensive. What the notice at a minimum must provide, is specifically spelled out.

Written notice is required prior to any change in placement.

Notice is required only before a "significant" change in placement.

Evaluations

The regulations are very similar.

Consent is required before an initial evaluation is conducted.

Only notice, not consent, is required.

Reevaluations must be conducted at least every three years.

Requires periodic reevaluations.

Full blown reevaluation not required; a review of progress and current evaluation information is required prior to a change in placement.

Full blown reevaluation not required; a review of progress and current evaluation information is required prior to a change in placement.

Provides for independent evaluations.

Not required.

Grievance Procedure

The IDEA does not require a grievance procedure nor a compliance officer.

Districts with more than 15 employees must designate an employee to be responsible for assuring district compliance with Section 504 and provide a grievance procedure for parents, students and employees.

Due Process Hearings

Both require districts to provide impartial hearings for parents or guardians who disagree with the identification, evaluation, placement or provision of a free and appropriate public education. (See grievance procedure requirement.) The rules are virtually identical.

Exhaustion

The parent or guardian must pursue the administrative hearing before seeking redress in the courts.

No exhaustion requirement

Enforcement

Not enforced by OCR. Compliance is monitored by the Missouri Department of Elementary and Secondary Education

Enforced by the Office for Civil Rights

Both statutes provide for due process hearings.

The Missouri Department of Elementary and Secondary Education will resolve child complaints.

Employment

No provision.

Employment of persons with disabilities is regulated.

Sample

PARENT/STUDENT RIGHTS IN IDENTIFICATION, EVALUATION AND PLACEMENT

Please Keep This Explanation for Future Reference
(Section 504 of the Rehabilitation Act of 1973)

The following is a description of the rights granted by federal law to students with disabilities*. The intent of the law is to keep you fully informed concerning decisions about your child and to inform you of your rights if you disagree with any of these decisions.

You have the right to:

1. Have your child take part in, and receive benefits from public education programs without discrimination because of his/her disability;
2. Have the school district advise you of your rights under federal law;
3. Receive notice with respect to identification, evaluation, or placement of your child;
4. Have your child receive a free appropriate public education. This includes the right to be educated with nondisabled students to the maximum extent appropriate. It also includes the right to have the school district make reasonable accommodations to allow your child an equal opportunity to participate in school and school-related activities;
5. Have your child educated in facilities and receive services comparable to those provided nondisabled students;
6. Have your child receive special education and related services if s/he is found to be eligible under the Individuals with Disabilities Education Act (PL 94-142) or Section 504 of the Rehabilitation Act;
7. Have evaluation, educational, and placement decisions made based upon a variety of information sources, and by persons who know the student, the evaluation data, and placement options;
8. Have transportation provided to and from an alternative placement setting at no greater cost to you than would be incurred if the student were placed in a program operated by the district;
9. Have your child be given an equal opportunity to participate in nonacademic and extracurricular activities offered by the district;
10. Examine all relevant records relating to decisions regarding your child's identification, evaluation, educational program, and placement;

11. Obtain copies of educational records at a reasonable cost unless the fee would effectively deny you access to the records;
12. A response from the school district to reasonable requests for explanations and interpretations of your child's records;
13. Request amendment of your child's educational records if there is reasonable cause to believe that they are inaccurate, misleading or otherwise in violation of the privacy rights of your child. If the school district refuses this request for amendment, it shall notify you within a reasonable time, and advise you of the right to a hearing;
14. Request an impartial due process hearing related to decisions or actions regarding your child's identification, evaluation, educational program or placement. You and the student may take part in the hearing and have an attorney represent you;
15. Ask for payment of reasonable attorney fees if you are successful on your claim; and,
16. File a local grievance.

The person in this district who is responsible for assuring that the district complies with

Section 504 is _____

Telephone number _____

*(Section 504 of the Rehabilitation Act statute and regulations: 29 U.S.C. 706(7), Section 794; 34 C.F.R. Part 104, the Individuals with Disabilities Education Act statute and regulations: 20 U.S.C. Section 1232g; 34 C.F.R. Part 99)

IDEA/504 FLOW CHART

